ORIGINAL

No. 95-157

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

CHRISTOPHER LEE ARMSTRONG, ET. AL.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT ROBERT ROZELLE

JOSEPH F. WALSH
Counsel of Record
316 West Second Street, Suite 1200
Los Angeles, California 90012
(213) 627-1793

Attorney for Respondent
ROBERT ROZELLE

25 pp

QUESTIONS PRESENTED

1. What is the legal standard that must be met in order for a defendant in criminal prosecution to be entitled to discovery on a selective prosecution claim.

2. Whether a defendant in making a discovery motion on a selective prosecution claim must in every case present evidence that the government has failed to prosecute others who are similarly situated, or is it sufficient if the defendant's discovery motion raises only a reasonable inference that the government has failed to prosecute others who are similarly situated.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

TABLE OF AUTHORITIES - Continued

Cases **Page**

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

No. 95-157

UNITED STATES OF AMERICA,

Petitioner,

v.

CHRISTOPHER LEE ARMSTRONG, ET. AL.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT ROBERT ROZELLE

OPINIONS BELOW

The opinion of the en banc court of appeals is reported at 48 F.3d 1508. The panel opinion of the court of appeals is reported at 21 F.3d 1431.

JURISDICTION

The judgement of the en banc court of appeals was entered on March 2, 1995. By order dated June 21, 1995, Justice O'Connor extended the time within which to file a petition for a writ of

certiorari to and including July 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PARTIES TO THE PROCEEDING

The petitioner is the United States of America. The respondents are Christopher Lee Armstrong, Robert Rozelle, Aaron Hampton, Freddie Mack, and Shelton Auntwan Martin.

STATEMENT OF THE FACTS

In April of 1992, respondents Christopher Armstrong, Aaron Hampton, Freddie Mack, Shelton Martin, and Robert Rozelle were charged with federal offenses for their alleged involvement in the distribution of cocaine base, known colloquially as "crack" or "rock". The charges stemmed from an investigation conducted under the direction of a joint state and federal task force comprised of detectives from the Inglewood Police Department and agents from the Bureau of Alcohol, Tobacco, and Firearms.

All five respondents were charged with conspiracy to distribute cocaine base under 21 U.S.C. § 846. Some of the respondents were also charged with selling cocaine base under 21 U.S.C. § 841(a)(1) and using firearms in connection with drug trafficking in violation of 18 U.S.C. § 924(c). The decision to charge the respondents with federal rather than California state offenses was significant. Federal law imposes a minimum sentence of 10 years and a maximum of life for those convicted of selling more than 50 grams of cocaine bases. 21 U.S.C. § 841(b). By contrast, under California law, the minimum sentence for that offense is three years and the maximum is five. Cal. Health &

Safety Code § 11351.5 (Deering 1993). All five respondents are Black.

Respondents filed a motion for discovery on a claim of selective prosecution, arguing that the decision to prosecute on federal charges rather then state charges was based on race. To support the motion for discovery, the respondent offered into evidence a study of every case involving a charge under 21 U.S.C. §§ 841 and 846 that the Federal Public Defender's Office for the Central District of California had closed in 1991. The study showed that in all 24 such cases the defendants had been Black.

The district court granted the motion for discovery. Specifically, the district judge ordered the government: (1) provide a list of all cases from the prior three years in which the government charged both cocaine base offenses and firearms offenses; (2) identify the race of the defendants in those cases; (3) identify whether state, federal, or joint law enforcement authorities investigated each case; and (4) explain the criteria used by the U.S. Attorney's Office for deciding whether to bring cocaine base cases to the federal court.

The government chose not to comply with the discovery order and instead filed a motion for reconsideration. In support of its motion, the government provided a list of all defendants charged with violation of 21 U.S.C. §§ 841 and 846 over a three year period (without any racial breakdown) as well as declarations by three law enforcement officers and two Assistant United States Attorneys. The declarations asserted that

socioeconomic factors led certain ethnic and racial groups to be particularly involved with the distribution of certain drugs and that Blacks were particularly involved in the Los Angeles-area crack trade. The declarations also contained a description of some of the race neutral factors on which federal prosecutors based their charging decisions for crack-related offenses. The factors specifically referred to were the strength of the evidence, the deterrent value of bringing the charge, the federal interest in the prosecution, and the suspect's criminal history.

District Judge Consuelo Marshall denied the motion for reconsideration. She stated her reasons for the denial at the hearing: "The statistical data provided by the Defendant raises a question about the motivation of the government which could be satisfied by the government disclosing its criteria, if there is any criteria, for bringing this case and others like it in Federal court. Without this criteria the statistical data is evidence and does suggest that the decisions to prosecute in Federal court could be motivated by race. Without expert testimony, this Court cannot conclude that the defendants' evidence is explained by social phenomena."

The government again chose not to comply with the discovery order. The respondents moved to dismiss the indictment as a sanction. The district judge dismissed the indictments, but stayed the order pending appeal. The government timely appealed.

The original three judge panel reversed, finding that the respondents' study did not establish a colorable basis for

ordering discovery because it did not show that others similarly situated were not prosecuted. United States v. Armstrong, 21 F.3d 1431 (9th Cir. 1994). A rehearing was granted and an en banc court affirmed the discovery order and dismissal, finding that the respondents' study did establish a colorable basis for believing that similarly situated members of other races were not prosecuted and there was no abuse of discretion. United States v. Armstrong, 48 F.3d 1508 (9th Cir. 1995).

ARGUMENT

I.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A DISCOVERY MOTION ON A SELECTIVE PROSECUTION CLAIM BECAUSE A PARTY SEEKING SUCH DISCOVERY IS ONLY REQUIRED TO SHOW A COLORABLE BASIS FOR HIS CLAIM OF SELECTIVE PROSECUTION AND IS NOT REQUIRED TO SHOW A PRIMA FACIE CASE OF SELECTIVE PROSECUTION.

The respondent Robert Rozelle urges the court to deny the petition for writ of certiorari filed by the government. The narrow holding of the Ninth Circuit in this case is that the district court did not abuse its discretion in granting a discovery motion on a selective prosecution claim.[1] District

---

[1] The government raises the concern that the decision of the court of appeals in this case changed the law concerning the requirements for a prima facie case of selective prosecution. (Gov't Br. p. 18) The court of appeal opinion states that "statistical disparities alone may suffice to provide the evidence of discriminatory effect and intent that will establish a prima facie case of selective prosecution." United States v. Armstrong, 48 F.3d 1508, 1513 (9th Cir. 1995). The government argues that this language means that the court held

courts typically have wide discretion in ruling on discovery motions. Wayte v. United States, 470 U.S. 598, 624 (1985) (Marshall, J., dissenting); United States v. Nixon, 418 U.S. 683, 702 (1974). Appellate review for abusive discretion requires the Court to consider "the bounds of that discretion and the principles that guide its exercise" but such review "necessarily would be limited." United States v. Taylor, 487 U.S. 326, 336 (1987).

Both the government and the respondents agreed that the legal test for obtaining discovery on a selective prosecution claim is the "colorable basis" test. (Gov't Br. pp. 19-20) This is consistent with Justice Marshall's acknowledgment in his dissenting opinion in Wayte v. United States, 470 U.S. 598, 623 (1985) that a defendant may obtain discovery "if he can show that he has a 'colorable basis' for a selective prosecution claim." The Court of Appeal in this case concluded that "Discovery may be

---

that a prima facie case of selective prosecution could be established without evidence that similarly situated persons of a different race have not been prosecuted. (Gov't Br. p. 18) Whether this language in the Armstrong opinion is in conflict with this Court's decision in Wayte v. United States, 470 U.S. 598 (1985) is an issue that is not directly raised in this case. First, the court of appeal in this case only ruled upon the granting of a discovery motion on a selective prosecution claim. It did not rule on and was never called upon to rule on the merits of a motion to dismiss the indictment on the grounds that the respondents had been selectively prosecuted in violation of their right to equal protection of the laws. Secondly, the government in its petition for writ of certiorari raises only an issue relating to the granting of a discovery motion on a selective prosecution claim and has not sought review by this court on the question of what is required in order to establish a prima facie case of selective prosecution warranting the dismissal of an indictment.

ordered when the evidence provides a colorable basis for believing that discriminatory prosecutorial selections have occurred." United States v. Armstrong, 48 F.3d 1501, 1512 (9th Cir. 1995). "The colorable basis standard is met by 'some evidence tending to show the essential elements of the claim.' United States v. Heidecke, 900 F.2d 1155, 1159 (7th Cir. 1990)." (Ibid.) In further defining the term 'some evidence' the court of appeal stated that "to obtain discovery on a selective prosecution claim, a defendant must present specific facts, not mere allegations, which establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on the part of government actors." (**Ibid.** at pp. 1512-1513, citing United States v. Bourgeois, 964 F.2d 935, 939 (9th Cir. 1992). The majority of the Circuits are in accord with this view.[2]

---

[2] The majority of the Circuits, the Third, Sixth, Seventh, Ninth, Tenth and District of Columbia have adopted the "colorable basis" test. In re Grand Jury, 619 F.2d 1022, 1030 (3d Cir. 1980); United States v. Adams, 870 F.2d 1140, 1146 (6th Cir. 1989); United States v. Heidecke, 900 F.2d 1155, 1159 (7th Cir. 1990); United States v. Armstrong, 48 F.3d 1508, 1512 (9th Cir. 1995); United States v. P.H.E., Inc., 965 F.2d 848, 860 (10th Cir. 1992); Attorney General of United States v. Irish People, Inc., 684 F.2d 928, 948 (D.C. Cir. 1982). Four Circuits, the First, Second, Fifth, and Eighth, apply a stricter "prima facie" showing test. United States v. Penagarican-Soler, 911 F.2d 833, 838 (1st Cir. 1990); St. Germain of Alaska Easter Orthodox Catholic Church v. United States, 840 F.2d 1087, 1095 (2d Cir. 1988); United States v. Johnson, 577 F.2d 1304, 1308 (5th Cir. 1978); United States v. Parham, 16 F.3d 844, 847 (8th Cir. (1994). Two Circuits, the Fourth and Eleventh, have adopted the "non-frivolous" standard. United States v. Greenwood, 796 F.2d 49, 52 (4th Cir. 1986); United States v. Gordon, 817 F.2d 1538, 1540 (11th Cir. 1988).

The essence of the government's claim is that the factual presentation made by the respondents in the district court did not establish a colorable basis of selective prosecution. The government argues that before a discovery motion for selective prosecution may be granted, the moving party must present specific instances or cases where other persons similarly situated have not been prosecuted. The government argues that the respondents' study by the Federal Public Defender's office in Los Angeles that showed that each defendant in the 24 cocaine base cases closed by that office in 1991 had been Black was an insufficient showing. In essence the government is arguing that in order to obtain discovery on a selective prosecution claim, respondents were required to show at least one case where a White defendant committed a cocaine base criminal offense and was not prosecuted for that offense in federal court, where the penalties for those offenses are higher than in state court.

However, if the respondents had evidence of such a case, there would be no need to bring a discovery motion. Respondents could simply proceed to the second step and file a motion to dismiss the indictment for selective prosecution. The government's argument fails to recognize the fundamental difference between a discovery motion on a selective prosecution claim and a motion to dismiss the indictment for selective prosecution. As the Court of Appeal in this case correctly points out: "The standard for a discovery showing is lower than that for a prima facie case." United States v. Armstrong, 48

F.3d 1508, 1513 (9th Cir. 1995). As Justice Reinhardt noted in his dissenting opinion in the original panel decision: "If they could make such a showing without any discovery, there would be no need for discovery in the first place." United States v. Armstrong, 21 F.3d 1431, 1439 (9th Cir. 1994) (Reinhardt, J. dissenting). While proof of a particular case of one White defendant who commits a cocaine base offense and is not prosecuted in federal court may arguably be necessary for a motion to dismiss the indictment for a selective prosecution, it is not an essential requirement for the granting of a discovery motion on selective prosecution.[3] As Justice Marshall noted in the Wayte decision, "most of the relevant proof in selective prosecution cases will normally be in the Government's hands." Wayte v. United States, 470 U.S. 598, 624 (1985).

A claim of selective prosecution is to be judged according to ordinary equal protection standards and will require proof that an enforcement system "had a discriminatory effect and that

---

[3] As noted in footnote 1, the court of appeal decision in this case states that even in establishing a prima facie case of selective prosecution in a motion to dismiss the indictment, it is not absolutely essential that the defendant present evidence of a particular case where others similarly situated have not been prosecuted. Statistical disparity alone may in some cases suffice to provide the evidence of discriminatory effect and intent. United States v. Armstrong, 48 F.3d 1508, 1513 (9th Cir. 1995). Thus, respondent does not concede that proof of a specific case where others similarly situated have not been prosecuted is absolutely essential to prove the merits of the claim of selective prosecution. However, as noted above, this issue is not directly raised in this case. Resolution of this issue is more appropriately reserved for review of a ruling on a motion to dismiss the indictment for selective prosecution and not upon review of the granting of a discovery motion on a selective prosecution claim.

it was motivated by a discriminatory purpose." Wayte v. United States, 470 U.S. 598, 608 (1985). To obtain discovery on such a claim, a party need only show "some evidence tending to show the essential elements of the claim." United States v. Armstrong, 48 F.3d 1508, 1512 (9th Cir. 1995). In order for a discovery motion to be granted, it does not require proof of the elements of a selective prosecution claim to the same extent as would be needed on a motion to dismiss the indictment. Rather, a colorable basis can exist if a defendant's showing on a discovery motion raises a reasonable inference that he may be the victim of selective prosecution. For example, in one case a court stated that a discovery motion on a selective prosecution claim may be granted where the defendant presents "enough evidence to demonstrate a reasonable inference of invidious discrimination." United States v. Redondo-Lemos, 955 F.2d 1296, 1302 (9th Cir. 1992).[4]

---

[4] In United States v. Redondo-Lemos, 955 F.2d 1296 (9th Cir. 1992) the court of appeal reviewed a district judge's finding that the United States attorney was committing equal protection violations by treating male drug couriers more harshly in plea bargaining than similarly situated females. The court noted that a district judge who perceives a pattern of invidious enforcement has ample authority under the court's supervisory powers to raise the matter sua sponte. The court also held that if invidious discrimination is proven, one remedy could be a reduction of a defendant's sentence. However, on the record presented, the court found no evidence of intentional discrimination and reversed and remand for further proceedings. The court stated that a district judge's own observations of disparate impact establishes a prima facie case of selective prosecution, but without more, is an insufficient basis for finding that the prosecutor was motivated by a discriminatory purpose. Upon remand, the district court conducted an evidentiary hearing concerning the U.S. Attorney's office policy concerning plea bargaining and its relationship to gender. The district court again found gender discrimination and reduced the sentences. On the government's appeal the Ninth Circuit again

The "reasonable inference" concept arises directly from this Court's reasoning in Batson v. Kentucky, 476, U.S. 79, 93-97 (1986). In Batson, this Court held that it is a violation of equal protection for a prosecutor in a criminal case to use his preemptory challenges to remove trial jurors on the basis of their race. Recognizing that an equal protection violation would require purposeful discrimination, the Court stated that a pattern of strikes against Black jurors may give rise to an "inference of purposeful discrimination." (Ibid. at p. 96). The burden then shifts to the prosecution to come forward with a neutral explanation for challenging Black jurors. (Ibid. at p. 97). The same logical approach exists in respondents' case, where the showing on the discovery motion raised a reasonable inference that prosecutors were selecting only Black defendants for prosecution in federal court for cocaine base offenses where the penalties were higher than state court. The trial court, finding a colorable basis of selective prosecution, granted the discovery motion and ordered the government to respond with an explanation which would either prove or disprove the claim of purposeful discrimination.

The government argues that the respondents' showing on the discovery motion was insufficient. The government states that evidence of a study by the Federal Public Defender's Office in

---

reversed the district court, ruling that the evidence did not support the district judge's finding of gender-based selective prosecution. United States v. Redondo-Lemos, 27 F.3d 439 (9th Cir. 1994).

Los Angeles showing that each defendant in 24 cocaine base cases closed by that office 1991 have been Black, does not show purposeful discrimination or selective prosecution. It is suggested that similar racial statistics exist in cases relating to White defendants in prosecutions for trafficking in LSD, antitrust violations, pornography and prostitution. The government relies upon this Court's decision in McCleskey v. Kemp, 481 U.S. 279 (1987) in support of their claim that respondents' statistical showing is unpersuasive.

In the McCleskey case, this court held that statistics establishing a higher percentage of Black defendants receiving the death penalty in the state of Georgia did not alone prove that the decision makers in those cases acted with a discriminatory purpose in violation of the equal protection clause. However, the McCleskey case was not a case involving the issue of discovery. It was a ruling on the merits of an argument made to vacate a death sentence in a murder case. The respondents in this case have not yet made a motion to dismiss the indictment for selective prosecution. They have only made a motion for discovery. Even if the statistical evidence is found to be insufficient to prove the merits of a selective prosecution claim, it does not follow that statistical evidence is valueless. If the statistical evidence raises a reasonable inference of selective prosecution, then it should be sufficient to warrant the granting of a discovery motion on a selective prosecution claim.

Much of what the government states in its brief concerning the law of selective prosecution is correct. However, the need to study the law of selective prosecution, in the context of a discovery motion, is simply to see if the discovery motion is focused in the right direction. A selective prosecution claim, as a defense to a criminal prosecution, is to be evaluated according to ordinary equal protections standards and to prevail on a claim, a defendant must prove an enforcement system "had a discriminatory effect and that it was motivated by a discriminatory purpose." Wayte v. United States, 470 U.S. 598, 608 (1985); Washington v. Davis, 426 U.S. 229 (1976); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

A central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. Washington v. Davis, 426 U.S. 229, 239 (1976). The Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. Bolling v. Sharpe, 347 U.S. 497 (1954). Classifications of citizens solely on the basis of race "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Hirabayashi v. United States, 320 U.S. 81, 100 (1943). Accord, Loving v. Virginia, 388 U.S. 1, 11 (1967); Shaw v. Reno, 509 U.S. __ (1993); Miller v. Johnson, No. 94-631 (June 29, 1995).

Although the burden of proving purposeful discrimination is on the defendant, Batson v. Kentucky, 476 U.S. 79, 93 (1986), the defendant may rely upon circumstantial evidence of invidious intent based upon proof of a disproportionate impact in the application of the law. Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976). "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." Washington v. Davis, 426 U.S. 229, 242 (1976). "Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977). See also, Yick Wo v. Hopkins, 118 U.S. 356 (1886); Gomillion v. Lightfoot, 364 U.S. 339 (1960).

In respondents' case, the claim made at the discovery hearing was that Black defendants arrested for cocaine base offenses are being selected on the basis of their race for prosecution in federal court rather than state court because the penalties in federal court are higher than those in state court. Central to their showing on the discovery motion was a study by the Federal Public Defender's Office in Los Angeles showing that each defendant in 24 cocaine base cases closed by that office in 1991 had been Black and that once again five Black male

defendants were being charged with cocaine base offenses in federal court rather than state court.

In response to the government's argument that these statistics prove nothing and that White defendants in antitrust prosecutions could make a similar showing, respondent makes two important observations. First, Black Americans are a racial minority in the United States that historically have been subjected to racial discrimination. The history of this discrimination and its origins are fully detailed in Justice Marshall's dissenting opinion in Regents of Univ. of California Bakke, 438 U.S. 265, 387-401 (1978). See also, United States v. Clary, 846 F.Supp. 768 (E.D. Mo. 1994) overruled in United States v. Clary, 34 F.3d 709 (8th Cir. 1994). As recently as 1967, this Court was called upon to strike down racially discriminatory statutes effecting Black Americans. Loving v. Virginia, 388 U.S. 1 (1967). Thus, it is highly unlikely that a showing of statistics relating to White defendants in antitrust prosecutions would have any persuasive effect.

Secondly, the crime involved in this case is the federal criminal prosecution of offenses relating to cocaine base, also known as "rock cocaine" or "crack". Respondent is not aware of any similar claim of selective prosecution being made by Black defendants in relation to any other class of crime.[5] In a

---

[5] The government in its brief refers to several other cases being prosecuted in California where the charged crime is illegal entry following deportation in violation of 8 U.S.C. 1326 and where the defendants are all Hispanic. The government claims that in light of the decision of the court of

recently submitted report to Congress by the United States Sentencing Commission, it was recommended that the higher sentences for cocaine base offenders in the Sentencing Guidelines be reduced and brought into proportion with the sentences imposed upon persons convicted of narcotic offenses involving powder cocaine. Of particular interest is the statement of the commission majority in support of recommended changes in federal cocaine sentencing policy, where the commissioners comment on perceived racial discrimination involving cocaine base prosecutions in federal court and Black defendants. The commission report states:

> "In the course of our study, we were faced with clear evidence that crack cocaine penalties are imposed largely on African-Americans. Almost 90 percent of federal crack offenders are Black. This disproportionate impact creates a perception of unfairness and raises allegations of racial bias. Everyone concerned with the legitimacy of the criminal justice system - and with the willingness of all citizens to accept its judgment as fair and final - must be troubled by allegations of unfairness, particularly racial discrimination." U.S. Sentencing Commission: Materials Concerning Sentencing For Crack Cocaine Offenses, 57 Criminal Law Reporter 2127, 2131 (May 31, 1995).

---

appeal in this case, the defendants in these immigration cases may be able to prevail on discovery motions involving a claim of selective prosecution by relying upon statistics establishing that most defendants who are prosecuted in California are Hispanic. Respondents suggest that there are too many variables between this case and the cases involving Hispanic defendants charged with immigration law violations, for reference to those cases to be of any assistance to the Court. Whether the defendants in those cases have meritorious discovery claims or not should await an appropriate case involving Hispanic defendants and immigration law violations.

Thus the concerns raised by respondents' discovery motion are not an isolated concerns raised only in the context of this case. They reflect a growing concern that the weight of the harsh penalties for cocaine base offenses is falling almost exclusively upon Black defendants. Whether this is by design, or by accident, or whether Black defendant's selected themselves by being the only one's committing the crime, is an issue to be resolved at a hearing on the merits of a selective prosecution claim. This case involves only a discovery motion. The showing made by respondents clearly raised sufficient concern to warrant further inquiry by way of court ordered discovery. A district court judge has discretion broad enough to order that discovery. There was no abuse of discretion warranting this court's intervention.[6]

---

[6] The government has raised the concern that the opinion of the court of appeals in this case may have a substantial adverse impact on the administration of criminal cases in the Ninth Circuit. Respondents believe that the exact nature of that impact may be overstated. Although many more selective prosecution discovery motions may have been filed in response to the court of appeals' decision in this case, it still remains a fact that very few such motions, other than in this case, have been granted.

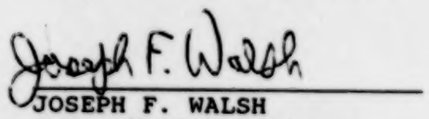
In United States v. Marshall, 56 F.3d 1210 (9th Cir. 1995) a Black defendant in a cocaine base prosecution filed the identical discovery motion utilizing the same statistical information as in respondent's case, but a district court judge in the Central District of California denied the discovery motion and the Ninth Circuit court of appeals affirmed the denial of the motion, finding no abuse of discretion.

In United States v. Nolan Reese, No. 94-5026 (July 26, 1995) a similar selective prosecution discovery motion was brought by Black defendants in a cocaine base prosecution in the Southern District of California in San Diego. The defendants presented similar statistics showing a disproportionate number of Black defendants being prosecuted in federal court for cocaine base offenses. The district court denied the discovery motion.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,



JOSEPH F. WALSH
Counsel of Record
Attorney for Respondent
ROBERT ROZELLE

The Ninth Circuit reversed and remanded the case for reconsideration of the motion based upon its ruling in this case, United States v. Armstrong, 48 F.3d 1508 (9th Cir. 1995). In reversing, the court expressly stated that the court of appeal was not deciding how the district court should exercise its discretion, implying that even under the Armstrong decision, the motion could be denied.

Finally, in United States v. Henry, No. CR94-628-CBM (June 26, 1995 Order), the case in which more than 1000 hours of work by attorneys was needed to prepare data and affidavits in order to respond to a discovery motion, it appears as though the District Court denied the discovery motion. Indeed, newspaper reports concerning the case indicate that one of the defendants was Black, the charge involved trafficking in cocaine base, the district court judge was the same district court judge who ruled in respondents' case, and yet the district court in its discretion denied the motion for a discovery. "Judge Rejects Claims of Bias in Crack Case," Los Angeles Times at pp. A3, A11 (June 27, 1995).

CERTIFICATE OF SERVICE

I, JOSEPH F. WALSH, a member of the Bar of this Court, hereby certify that on August 24, 1995, **BRIEF FOR RESPONDENT ROBERT ROZELLE TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT** was served upon counsel listed below by depositing copies of same in the United States mail, with first class postage prepaid, addressed as follows:

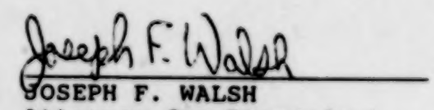
DREW S. DAYS, III
SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
10TH & PENNSYLVANIA AVE., N.W.
WASHINGTON, D.C. 20530

DAVID DUDLEY, ESQ.
1999 AVENUE OF THE STARS, SUITE 2800
LOS ANGELES, CA 90067

TIMOTHY C. LANNEN, ESQ.
880 W. FIRST STREET, SUITE 1500
LOS ANGELES, CA 90012

BARBARA O'CONNOR, ESQ.
DEPUTY FEDERAL PUBLIC DEFENDER
1503 UNITED STATES COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CA 90012

BERNARD ROSEN, ESQ.
1717 FOURTH STREET, THIRD FLOOR
LOS ANGELES, CA 90401



JOSEPH F. WALSH
Attorney for Respondent
ROBERT ROZELLE